



STATE OF NORTH DAKOTA
OFFICE OF THE STATE AUDITOR
STATE CAPITOL
600 E. BOULEVARD AVE. - DEPT. 117
BISMARCK, ND 58505

Testimony to the Interim Higher Education Committee

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Testimony Presented by
Gordy L. Smith, CPA
Audit Manager
Office of the State Auditor

Chairman Skarphol and members of the interim Higher Education Committee, I'm here at the committee's request to comment on the role of the State Board of Higher Education and the Budget Section in approving a new capital project or approving changes to a capital project approved by the Legislative Assembly.

It is important to recognize that with large construction/remodeling projects there will be modifications associated with the cost and scope of the projects. This is the "nature of the business" when dealing with projects that may take two or more years from their initial design to completion. The costs of labor and construction materials can vary significantly over that time span and the scope of the project can also change.

Board approval is required prior to making a request or application for state or federal legislative appropriations and all other funds sources (SBHE Policy 902.1). During the time the legislature is not in session except for the six months immediately preceding the convening of the regular session, and unless otherwise restricted by previous legislative action or other law, Budget Section approval is needed when campus improvements and building maintenance financed by donations, gifts, grants and bequest is more than three hundred eighty-five thousand dollars. (NDCC 15-10-12.1) All other projects must be approved by the legislature.

We believe that in the beginning of the approval process, the Legislature itself can play an important role by clearly communicating specifically what is being approved. For example, the cost, scope, and funding source of the project could be identified in the appropriate bill providing the approval. The wording of this section of the appropriation bill should be clearly worded to identify these as "requirements" of the construction/remodeling project. This is important

because of what I discuss below relating to the formal Attorney General's Opinion we requested during the performance audit of the University System Capital Projects.

One important issue that was identified during the University System Capital Projects performance audit involved a construction/remodeling project that was approved by the Legislature. The session law clearly stated the source of funding was to be private donations, gifts, and other funds. However, the NDSU Development Foundation (Foundation) issued debt and had the facility built/remodeled. Subsequently, NDSU entered into a capital lease (thereby incurring debt) where public funds are being used to pay off the Foundation's debt. It was our belief that this arrangement circumvented legislative intent since public monies were being used to repay the debt incurred to construct/remodel the facility.

The Attorney General issued a formal opinion (subsequent to the issuance of our performance audit) which indicated the University did not violate the session law by entering into the aforementioned capital lease arrangement. Specifically, the Attorney General's Opinion said "...it is my opinion that since the 2007 Session Law did not contain any requirements but rather was discretionary and because the State Board of Higher Education (SBHE) has separate constitutional authority to allow the North Dakota State University (NDSU) to lease a building from the NDSU Development Foundation (Foundation), there could be no violation of the Session Law."

We respectfully suggest the full Legislature decide whether it considers this lease arrangement appropriate and acceptable, as well as whether changes made to projects should be communicated to the Legislature. If the Legislature decides the capital lease arrangement is appropriate and acceptable, they should perhaps decide what restrictions apply, if any. If the Legislature does not agree that these arrangements are appropriate and acceptable, this should be clearly set forth in law.

As far as approvals for new projects or changes to projects approved by the Legislature, it should be clearly established in law that the approvals by the Legislative Assembly or the Budget Section should be sought and received prior to any expenditure or costs being incurred by the University on the project. Seeking approval after expenditures have already been incurred does not provide any control.